



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

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DECISION OF THE BOARD

Mailed and Filed: JULY 13, 2022

IN THE MATTER OF:

Appeal Board No. 622091

PRESENT: RANDALL T. DOUGLAS, MEMBER

The Department of Labor issued the initial determination disqualifying the claimant from receiving benefits, effective July 10, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by NEW YORK CITY - HR prior to July 10, 2021, cannot be used toward the establishment of a claim for benefits. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There were appearances by the claimant and on behalf of the employer. By decision filed March 10, 2022 (), the Administrative Law Judge overruled the initial determination.

The employer appealed the Judge's decision to the Appeal Board.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant was a fulltime probationary subway conductor for the Metropolitan Transit Authority (MTA) from January 16, 2018, until July 9, 2021. The claimant's position is considered safety sensitive. The employer's policy, which is provided to new hires at orientation, requires that employees advise the employer of outside employment so that the employer can determine whether the dual employment causes a conflict of interest. Failure to follow the employer's policy can lead to disciplinary action, up to and including termination.

The claimant has been a hairdresser/wig maker for 20 years. She has a salon in her house. She advertises her skills on social media. When hired the claimant indicated she had no outside employment. The claimant did not inform the employer that she had self-employment as a hairdresser/wig maker.

In October 2019, and April 2020, the claimant injured her wrist. She went out on medical leave and filed for workers compensation benefits. While she was out on leave, the claimant updated her social media posts for her hairdressing/wig making business. Her posts advised readers that she was accepting appointments. The posts did not state that her business was closed. She continued to answer questions about hairstyling generated from her social media posts.

While she was out on leave, the employer had the claimant investigated. The investigator contacted the claimant about hairstyling and the possibility of having a wig made. When the investigator asked about costs, the claimant quoted prices. When the investigator asked about having a wig made, the claimant advised the investigator that she couldn't set up an immediate appointment due to her injured arm. The claimant did not tell the investigator that her business had closed.

The employer sent a termination letter to the claimant on July 6, 2021, effective July 9, 2021.

OPINION: The credible evidence establishes that the claimant had an active business which she failed to advise her employer about. The claimant does not dispute that she knew that she was required to inform the employer about any other employment that she had. We do not credit the claimant's contention that she didn't inform the employer about her hairdressing/wig making business because she didn't engage in that work while working for the MTA. We note that the claimant had active social media posts during her period of employment with the MTA, which advised the public that she was taking appointments for hairdressing and wig making. The posts did not advise the public that the business was closed.

Further, when an investigator inquired about costs for claimant's services, the claimant provided the investigator with prices. She did not tell the investigator that she wasn't taking clients, or the business was closed, only that she couldn't give her an immediate appointment because of an arm injury. We also do not find claimant's argument that she didn't advise the

investigator that her business was closed because she was a private person and that the investigator had not right to know her private business. While the reason for closing might have been claimant's private business, the fact that there was no business would have been a statement of fact, if true.

Given the circumstances of this case, we find that the claimant had an active business for 20 years which she could return to when she chose to, and that under the policy of the employer the claimant was required to inform that employer of her outside business activity. The claimant's failure to inform the MTA at hire of her hairdressing/wig making enterprise was a violation of a reasonable policy of the employer and we conclude that her omission constitutes misconduct under the law.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determination, disqualifying the claimant from receiving benefits, effective July 10, 2021, on the basis that the claimant lost employment through misconduct in connection with that employment and holding that the wages paid to the claimant by prior to July 10, 2021, cannot be used toward the establishment of a claim for benefits, is sustained.

The claimant is denied benefits with respect to the issues decided herein.

RANDALL T. DOUGLAS, MEMBER